No. 94-8262
(A-643)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

MAR 2 1995
OFFICE OF THE CLERK
SUPREME COURT, U.S.

CLARENCE ALLEN LACKEY

Petitioner,

v.

STATE OF TEXAS

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

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57 pp

ORIGINAL QUESTION PRESENTED

(1) Whether the execution of a death sentence constitutes cruel and unusual punishment under the Eighth Amendment as understood by the Framers if, as a result of inordinate delay not attributable to his own conduct, the condemned inmate is forced to endure nearly two decades on death row, during which time his execution is repeatedly rescheduled.

SUPPLEMENTAL QUESTIONS PRESENTED

(2) (a) Whether the Texas courts unambiguously invoked the Texas "abuse of the writ" doctrine as an independent and adequate state law ground for decision in this case.

(b) Assuming that the Texas courts unambiguously invoked the Texas "abuse of the writ" doctrine, whether that state procedural ground is applied with sufficient consistency to preclude federal review in this Court.

(3) Whether the Texas courts' holding that Petitioner's Eighth Amendment challenge to his death sentence was not "cognizable" on state habeas review is an independent and adequate state law ground for decision barring this Court's review.

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No. 94-8262

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

CLARENCE ALLEN LACKEY,

Petitioner,

v.

STATE OF TEXAS

Respondent.

Petitioner Clarence submits this Supplement to his previously lodged certiorari petition.

ADDITIONAL REASONS WHY THIS COURT SHOULD GRANT CERTIORARI

I.

THE TRIAL COURT'S SUGGESTION TO THE TEXAS COURT OF CRIMINAL APPEALS THAT TEXAS' ABUSE-OF-THE-WRIT DOCTRINE SHOULD PERHAPS BE INVOKED IN THIS CASE -- AND THE STATE HIGH COURT'S FAILURE TO ACT ON THAT SUGGESTION -- DOES NOT QUALIFY AS A "PLAIN STATEMENT" INVOKING AN INDEPENDENT AND ADEQUATE STATE LAW GROUND UNDER HARRIS V. REED, 489 U.S. 255 (1989).

In its proposed findings of fact and conclusions of law, the state habeas trial court *suggested* to the Court of Criminal Appeals that *perhaps* Petitioner's second state habeas application should be procedurally barred under the Texas abuse-of-the-writ doctrine. See Ex Parte Lackey, No. 18,075-B, *Findings of Fact and Conclusions of Law*, at 5-6 (137th Dist. Ct. Lubbock County

March 1, 1995) ("The Court of Criminal Appeals has recognized the doctrine of 'abuse of the writ' and [has] held that an applicant may waive and abandon his allegations by the repetitious filing of [state habeas] applications. [citation omitted]. ... In the instant case, Applicant persists in raising repetitious applications continue [sic] to lack merit without explaining why he could not have brought his complaints in his initial writ applications.[1] His abuse of the state writ process may procedurally bar and foreclose the issue. Regardless, [addressing the merits] ...") (emphasis added) (**attached as Appendix A**).

The Texas Court of Criminal Appeals issued its traditional one-page boilerplate order denying habeas relief, which stated:

> In the instant case, applicant presents a single allegation in which he challenges the constitutionality of proceeding with his execution. The trial court has entered findings of fact and conclusions of law and recommended the relief sought be denied. This Court has reviewed the record. *The findings and conclusions entered by the trial court are supported by the record and upon such basis the relief sought is denied.*

Ex Parte Lackey, Writ No. 24,267-02 (Tex.Crim.App. March 1, 1995) (emphasis added) (attached hereto as **Appendix B**).

Looking at both the trial court's proposed findings of fact and conclusions of law and the Court of Criminal Appeals' order adopting them -- which failed to mention the trial court's suggestion that relief perhaps be denied on state abuse-of-the-

[1] The trial court's reference to "applications" was obviously an error. Petitioner filed only *one* previous state habeas application (in 1992).

writ grounds -- there is an obvious ambiguity in the state courts' orders regarding whether the state abuse-of-the-writ doctrine was being invoked as an independent and adequate state law ground. The trial court's use of the term "*may*" -- suggesting a possible course of action to the appellate court but not itself taking that course of action -- and the Court of Criminal's issuance of a boilerplate order that failed to mention the trial court's reference to the abuse doctrine create the very type of ambiguity that requires this Court to presume that relief was denied on the merits. See Harris v. Reed, 489 U.S. 255 (1989).

II.

ASSUMING *ARGUENDO* THAT THE TEXAS COURTS' INTENDED TO DENY RELIEF ON STATE ABUSE-OF-THE-WRIT GROUNDS, THIS COURT CANNOT TREAT A TEXAS ABUSE FINDING AS AN INDEPENDENT AND *ADEQUATE* STATE LAW GROUND.

Federal habeas review of the merits of a constitutional claim may be barred when a state court has previously held that the habeas petitioner has failed to comply with a state procedural default rule that qualifies as an "independent and adequate state law ground." See Wainwright v. Sykes, 433 U.S. 72 (1977). Whether such a procedural default is an independent and adequate state law ground is a federal question reviewed *de novo* by the federal courts. Johnson v. Mississippi, 486 U.S. 578, 587 (1988). A state procedural rule is "adequate" only if it represents a "firmly established and regularly followed state practice." James v. Kentucky, 466 U.S. 341, 348-49 (1984); see

also Johnson v. Mississippi, 486 U.S. at 587 ("A state procedural ground is not 'adequate' unless the procedural rule is 'strictly or regularly followed.'") (citations omitted).

The great weight of Texas case law demonstrates that the Texas abuse-of-the-writ doctrine is not a consistently-applied independent and adequate state law ground -- as counsel for Respondent, the Texas Attorney General's Office, has twice conceded in two other recent cases. See **Appendix C** (copies of pleadings in which the Attorney General recently conceded that the Texas abuse doctrine is not an adequate state law ground).

The Court of Criminal Appeals' abuse of the writ "rule" is neither regularly followed nor firmly established. No consistency can be found either as to the number of state habeas applications an inmate may file before being cited with abuse of the writ, the reasons for which the Court of Criminal Appeals will invoke the abuse rule, or the grounds on which it will find "good cause" to permit an additional application to be filed notwithstanding an abuse finding. Perhaps most important, the Court of Criminal Appeals itself, within the last year, has acknowledged in a published opinion the continuing uncertainty about the scope and definition of Texas' purported abuse of the writ doctrine. See Ex Parte Barber, 879 S.W.2d 889 (Tex.Crim.App. 1994) (discussed infra). Under such circumstances, the federal courts cannot fairly conclude that Texas' abuse of the writ rule constitutes a regularly followed and firmly established procedure that may federal habeas relief.

Accordingly, this Court should grant certiorari in order to address this important issue, which potentially affects countless Texas criminal defendants.

A. Texas' abuse of the writ rule is not an "adequate" state law ground because the procedural rule is inconsistently applied.

No articulated rule limits the number of post-conviction applications a Texas prisoner may file before he may be found to have "abused the writ" by the state courts. As John Jasuta, Chief Staff Attorney for the Texas Court of Criminal Appeals, has publicly stated, "[t]here is no general rule governing how many applications constitute an abuse of the writ process" under Texas law.[2] Indeed, the caselaw on Texas' abuse of the writ doctrine is quite sparse.[3]

The Texas Court of Criminal Appeals has on rare occasion found that a state habeas petitioner abused the writ after having filed one, two, or three successive habeas petitions;[4] in other

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[2] See Post Conviction Remedies Pursuant to Article 11.07 [of the Texas Code of Criminal Procedure], "Procedures in Abuse Cases within the Court," (excerpt) at 13, presented at the Advanced Criminal Law Seminar 1990 sponsored by the State Bar of Texas (1990) (**attached hereto as Appendix D**).

[3] Computerized research reveals that there are less than a dozen cases available on the LEXIS legal database in which the Texas Court of Criminal Appeals has mentioned its abuse of the writ doctrine. The doctrine is rarely invoked.

[4] See, e.g., Ex Parte Carr, 511 S.W.2d 523 (Tex.Crim.App. 1974) (citing habeas petitioner with abuse of the writ on second habeas application); [Ex Parte] Bright, No. 10,968-04, unpublished order (Tex.Crim.App. April 10, 1985) (**available on LEXIS**) (citing habeas petitioner with abuse of the writ on fourth habeas application); [Ex Parte] Robinson, No. 14,031-03, unpublished order (Tex. Crim. App. April 24, 1985) (**available on**
(continued...)

cases, however, the same court has waited to impose an abuse of the writ sanction until after many more successive habeas applications (over ten in some cases) have been filed and rejected on the merits.[5]

In numerous other cases, the Texas Court of Criminal Appeals has permitted numerous applications to be filed by a single habeas petitioner without invoking the abuse of the writ bar, even when the trial court has recommended that the applicant be cited for abuse.[6] See generally *Affidavit of Troy Bennett, ¶ 5*

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[4](...continued)
LEXIS) (citing habeas petitioner with abuse of the writ on third habeas application); Ex Parte Motley, Writ No. 23,806-03, unpublished order (Tex. Crim.App. Feb. 6, 1995) (citing habeas petitioner with abuse of the writ on third habeas application); see also Ex Parte Barber, 879 S.W.2d 889, 891 n.1 (Tex.Crim.App. 1994) (suggesting in obiter dicta that a state habeas applicant should ordinarily be held in abuse of the writ on a second habeas application raising an issue that could have been raised in the first application).

[5] See, e.g., Ex Parte Stuart, 653 S.W.2d 13, 13-14 (Tex. Crim. App. 1983) (noting that the habeas applicant was cited with abuse only after filing over ten prior habeas applications that were rejected on the merits); Ex Parte Choice, 828 S.W.2d 5, 5 n.1 (Tex.Crim.App. 1992) (noting that the habeas applicant was previously cited with abuse after filing six habeas petitions that were rejected on the merits). Notably, in Stewart, on the petitioner's twelfth state habeas appeal, the Texas Court of Criminal Appeals waived the abuse bar and addressed the merits of his claim -- thus, further demonstrating the inconsistent application of the state court abuse doctrine. See Stewart, 653 S.W.2d at 13-14. Likewise, in Choice, the Texas Court of Criminal Appeals cited the habeas petitioner with abuse of the writ on his seventh state habeas appeal, but then waived the abuse doctrine on the petitioner's eighth state habeas appeal.

[6] See, e.g., Ex Parte Bell, No. 70,949, unpublished order (Tex.Crim. App. November 6, 1991) (despite trial court's recommendation that Bell be cited for abuse on third application for habeas relief, appellate court granted habeas relief on the ground that jury could not consider evidence of mental
(continued...)

(Chief Clerk of the Texas Court of Criminal Appeals) (noting recent examples of state habeas applicants filing successive petitions not subject to abuse of the writ sanction) (attached hereto as **Appendix E**). It is apparent that the Texas abuse of the writ doctrine has been applied (or, more commonly, waived or ignored) without any rhyme or reason. As noted, counsel for Respondent herein, the Texas Attorney General, has recently made this concession in two other Texas federal habeas cases. See **Appendix C**.

Perhaps the most compelling evidence that there is no firmly established and regularly followed abuse of the writ rule under Texas law is the 1994 decision in Ex Parte Barber, 879 S.W.2d 889 (Tex. Crim. App. 1994). In Barber, the Texas Court of Criminal Appeals suggested that a clearly-announced, consistently-applied state court abuse of the writ doctrine would be a sound policy *in the future*, but declined to announce such an abuse doctrine in that case. See id. at 891 n.1 ("*It may well be* that in order to reduce the unnecessary waste of time and expenses to the court system incurred by numerous applications for writs of habeas corpus, *this Court should consider* refusing to hear writs that raise points of error that were available when the first writ was filed ....") (emphasis added). Judge Meyer's

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[6](...continued)
retardation); Ex Parte Ellis, Writ No. 17,233-03, unpublished order (Tex. Crim. App. 1992) (relief denied on third habeas application; no abuse finding made despite recommendation of same by trial court); Ex Parte Callins, Writ No. 21,422-04, unpublished order (Tex.Crim.App. Feb. 18, 1994) (relief denied on fourth state habeas application; no abuse finding).

concurrence in Barber offers further proof that there is no consistently applied abuse of the writ doctrine in the Texas courts: "Although I too am eager for *comprehensive changes* in Texas habeas corpus practice, and might ultimately favor many of the *suggestions* made gratuitously by the Court here, I invite the bench and bar to discount the *obiter dicta* of this case. [It is] superfluous in the present context ..., since it purports to decide *a question of first impression in Texas criminal jurisprudence* without the benefit of briefing or oral argument." Id. at 892 (emphasis added).

Although a handful of Texas cases have purported to apply an abuse of the writ doctrine in the past decade, such cases are the exception rather than the rule, as Ex Parte Barber, supra, clearly demonstrates. Barber thus provides strong evidence that Petitioner violated no regularly and strictly applied rule prohibiting abuse of the writ in state court.

The relevance of Barber to the question of the adequacy of Texas' abuse of the writ rule is illustrated by Siripongs v. Calderon, 35 F.3d 1308, 1318 (9th Cir. 1994). Siripongs, a death row inmate, unsuccessfully sought state habeas relief in the California courts. He then proceeded to federal court, filing a "mixed petition" that raised numerous challenges to his conviction and sentence, including some which had not been presented to the state courts. He was permitted to return to state court and file a second petition raising the non-exhausted claims; the California courts denied his second petition as an

abuse of the writ under state law. The federal district court concluded that this finding amounted to an independent and adequate procedural bar to the consideration of some of Siripongs' claims. Id. at 1316-18.

On appeal, the Ninth Circuit observed that the California Supreme Court, some time after denying Siripongs' second petition, had issued an opinion in another case discussing in detail the uncertainty that previously had surrounded the application of California's abuse of the writ doctrine in state habeas proceedings. Id. at 1318, citing In Re Clark, 855 P.2d 729 (Cal. 1993). In considering whether the state court abuse of the writ finding as to Siripongs' second state habeas petition was an adequate and independent bar to federal review, the Ninth Circuit noted that although "subsequent petitions in California had, prior to Clark, never been condoned by the California courts, they clearly were often permitted as a matter of discretion." Id. at 1318. California's failure to apply its state "abuse of the writ" doctrine consistently, as illustrated by Clark's acknowledgment of that prior practice, compelled the conclusion that this rule was not "the type of independent and adequate state ground that precludes federal review." Id.

The parallel of Clark to the Texas Court of Criminal Appeals' ruminations in Barber is compelling. As noted supra, no recognized rule limits the number of post-conviction applications a Texas prisoner may file before he might be found to have "abused the writ," and no regularly applied rule requires Texas

prisoners to raise issues on direct appeal before raising them in state habeas corpus proceedings. This practice demonstrates that, at the time Petitioner sought state review of his claims of federal error, such applications for relief under Art. 11.07 "clearly were often permitted as a matter of discretion." Siripongs, 35 F.3d at 1318. Accordingly, as in Siripongs, the federal courts in this case may not defer to the imposition of such a inadequate procedural bar to block federal review of the merits of any of Petitioner's claims.

As the Ninth Circuit in Siripongs looked to the California Supreme Court's recent opinion in Clark for evidence that no firmly settled and regularly applied doctrine of "abuse of the writ" had been applied to Siripongs' second petition, the Fifth Circuit should have examined Barber, which compels the same conclusion in this case. The speculative tone of the Court of Criminal Appeals' discussion of Texas' abuse of the writ doctrine in Barber, like the California Supreme Court's candid acknowledgment of the prior inconsistent application of its own abuse of the writ doctrine in Clark, is critically relevant evidence that the federal courts may not ignore in determining whether the Texas abuse of the writ doctrine is an adequate state law ground. The reasoning of Siripongs plainly applies to this situation, and just as plainly requires the lower courts to address the merits of Petitioner's claim notwithstanding the state court's talismanic invocation of abuse of the writ. See also Bransford v. Brown, 806 F.2d 83, 84-85 (6th Cir. 1986) (fact

that Michigan had no recognized rule limiting the number of appeals meant that no adequate procedural bar could exist on this basis), cert. denied, 481 U.S. 1056 (1987).

C. The Texas abuse of the writ doctrine is not an "adequate" state law ground because it is an inherently discretionary procedural rule.

The above-cited Texas habeas cases reveal that the Court of Criminal Appeals' abuse of the writ doctrine is an inherently *discretionary* rule, which the state court may invoke, or decline to invoke, at its whim, unguided by any articulated standards.

Such an irreducibly discretionary rule cannot constitute an "adequate" state law ground to bar federal habeas review.[7] Numerous lower federal courts have in recent years held that a purely discretionary state court procedural rule can never be an adequate state law ground.[8]

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[7] See Williams v. Georgia, 349 U.S. 375, 389 (1955); see also Sullivan v. Little Hunting Park, 396 U.S. 229, 233-34 (1969) (party's violation of state court procedural rule "more properly deemed discretionary than jurisdictional" does not bar federal review as an independent and adequate state law ground); Taylor v. Illinois, 484 U.S. 400, 421 (1988) (Brennan, J., joined by Marshall & Blackmun, JJ., dissenting on other grounds) ("[I]t is well established that where a state court possesses the power to disregard a procedural default in exceptional cases, the state court's failure to exercise that power in particular cases does not bar review by this Court.") (citing cases); Coleman v. Thompson, 111 S. Ct. 2546, 2569 (1991) (White, J., concurring) ("The predicate for [the petitioner's] argument is that on occasion the Virginia Supreme Court waives the untimeliness of the [procedural] rule. If that were true, the rule would not be an adequate and independent state law ground barring ... habeas review.").

[8] See, e.g., Gutierrez v. Moriarty, 922 F.2d 1464, 1469 (10th Cir. 1991) ("When assessing the adequacy of the New Mexico (continued...)

D. Texas' abuse of the writ rule fails as an "adequate" state law ground because the Texas court arbitrarily applies its own exceptions to the "rule."

In addition to the plainly discretionary character of Texas' inconsistently-applied abuse of the writ rule, the contours of that "rule" itself -- that is, the circumstances in which it may be expected to apply -- are so unclear that the "rule" cannot bar federal habeas review of a state prisoner's constitutional claims. The reasons the Court of Criminal Appeals has articulated for invoking its abuse "rule" are varied, and are applied haphazardly and arbitrarily. For instance, in Ex Parte Emmons, 660 S.W.2d 106 (Tex. Crim. App. 1980), the state court cited the habeas applicant for abuse on his first application because he had apparently committed perjury in his application. Id. at 107-110. In Ex Parte Carr, 511 S.W.2d 523 (Tex. Crim. App. 1974), the court applied the abuse rule because the applicant, on second state habeas appeal, raised grounds that were apparently deliberately withheld during his first state

[8](...continued)
procedural bar rule, we must therefore recognize that the New Mexico state courts have expressly reserved their unfettered discretion to waive the [procedural rule]. This circumstance argues against the conclusion that the courts apply the rule regularly and evenhandledly."); Harmon v. Ryan, 959 F.2d 1457, 1461 (9th Cir. 1992) ("A procedural default rule is ... not 'adequate' if ... the procedural rule appears discretionary."); Siripongs v. Calderon, 35 F.3d 1308, 1318 (9th Cir. 1994) ("... the procedural bars the State relied on are discretionary and have not been applied consistently.... We have recognized that such a state procedural rule cannot act as a bar to federal review."); Karis v. Vasquez, 828 F. Supp. 1449, 1461 (E.D. Cal. 1993) ("The Supreme Court has ... held that a discretionary state [procedural] rule cannot bar federal review.") (citing cases).

habeas appeal. Id. at 524-26.

In certain circumstances, upon a showing of "good cause," the Texas court has permitted a successive habeas application to be filed even after the applicant has been cited for abuse of the writ in prior cases.[9] What constitutes a showing of "good cause" is as inconsistently applied by the state court as the initial finding of abuse is arbitrarily made. Despite the Court of Criminal Appeals' recognition that "good cause" is shown when an application raises claims based on a change in the law, see Ex Parte Bilton, 602 S.W.2d 534 (Tex. Crim. App. 1980); see also Stuart, supra, even that exception to the rule is arbitrarily applied.[10] Indeed, in this case, Petitioner contended in his *Objections to the Trial Court's Findings of Fact and Conclusions of Law*[11] that his Eighth Amendment claim was rooted in a November

[9] See, e.g., Ex Parte Choice, 828 S.W.2d 5, 5 n.1 (Tex.Crim.App. 1992); Ex Parte Dora, 458 S.W.2d 392 (Tex. Crim. App. 1977); Ex Parte Stuart, 653 S.W.2d 13 (Tex. Crim. App. 1983).

[10] At least one Texas prisoner has been cited for "abuse of the writ" after filing a habeas application raising claims based on this Court's decision in Penry v. Lynaugh, 492 U.S. 302 (1989). See Ex Parte Hogue, No. 16,907-05, unpublished order (Tex. Crim. App. September 18, 1991). Because the Court of Criminal Appeals has elsewhere admitted that the 1989 decision in Penry created a "right not previously recognized" in Texas, see Black v. State, 816 S.W.2d 350, 374 (Tex. Crim. App. 1991) (opinion of Campbell, J., for a majority of the court). its refusal to hear the applicant's Penry claim in Hogue clearly illustrates the arbitrary character of the Texas abuse of the writ doctrine. Such unreasonable results cannot satisfy the federal requirement that the state procedural rule be a "firmly established and regularly followed state practice." James v. Kentucky, 466 U.S. at 348.

[11] A copy of that pleading has previously been faxed to this
(continued...)

1993 decision of the British Privy Council which was not decided until long after his first state habeas appeal was over in late 1992.

In conclusion, the above analysis clearly demonstrates that the Texas Court of Criminal Appeals has no standard for determining when an applicant's successive filing of habeas applications constitute an abuse of the writ. The Texas court's insistence on holding Petitioner to standards not enforced against similarly situated state habeas applicants is manifestly arbitrary and unfair. Because Texas does not enforce this purported procedural default rule regularly or strictly in all cases, it is not an *adequate* ground for decision to which the federal courts must defer. On the contrary, because the state court's abuse ruling -- if in fact one was unambiguously made -- is not supported by an adequate state ground, this Court is free to address the merits of Petitioner's Eighth Amendment claim.

III.

THE TEXAS COURTS' HOLDING THAT PETITIONER'S EIGHTH AMENDMENT WAS "NON-COGNIZABLE" IN A STATE HABEAS CORPUS PROCEEDING IS NOT AN *INDEPENDENT* AND ADEQUATE STATE LAW GROUND.

The state trial court held that the Eighth Amendment claim raised in the courts below was not "cognizable" in a state habeas corpus proceeding filed pursuant to TEX. CODE CRIM. PRO. Art. 11.07. See *Findings of Fact and Conclusions of Law*, at 10

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[11](...continued)
Court.

("Applicant's claim is not cognizable in a petition to determine the legality of his sentence or confinement and does not rise to the level of denial of due process pursuant to the eighth amendment [to] the United States Constitution ...."). As noted, the Court of Criminal Appeals adopted the trial court's findings and conclusions *in toto* in a boilerplate order.

The trial court's legal conclusion is erroneous as a matter of well-established Texas law and, moreover, is not an *independent* and adequate state law ground. Petitioner's state habeas application relied on a great deal of legal authority -- both American and English cases -- that holds that it would constitute "cruel and unusual punishment" to carry out a death sentence after an inordinate delay and the setting of repeated execution dates. The claim, thus, directly implicates the Eighth Amendment. It attacks both the current legality of Petitioner's death sentence and the State's right to keep Petitioner on Texas' death row and does so on federal constitutional grounds. Thus, it is cognizable in an Art. 11.07 habeas corpus proceeding under well-established Texas precedent. See, e.g., Ex Parte McKay, 819 S.W.2d 478, 481 (Tex.Crim.App. 1990) (all federal constitutional claims are cognizable in Art. 11.07 habeas corpus proceedings); Ex Parte Banks, 769 S.W.2d 539, 540 (Tex.Crim.App. 1989) (same).

The Texas courts' denial of state habeas relief on "non-cognizability" grounds is not an independent and adequate state law ground precluding federal review because the *threshold* issue in the Texas courts' determination of whether Petitioner's

allegations "rose to the level" of a federal constitutional violation was itself a pure federal question. Thus, because federal law was intertwined with the Texas courts' determination of what is and what is not "cognizable" on Art. 11.07 state habeas review, the Texas courts' holding that Petitioner's Eighth Amendment claim was not "cognizable" is not an *independent* state law ground. See Ake v. Oklahoma, 470 U.S. 68 (1985).

IV.

IF THERE IS ANY QUESTION ABOUT THIS COURT'S JURISDICTION TO GRANT CERTIORARI IN THIS CASE, PETITIONER REQUESTS THAT THIS COURT TREAT HIS CERTIORARI PETITION AS AN ORIGINAL APPLICATION FOR WRIT OF HABEAS CORPUS FILED IN THIS COURT.

Although Petitioner believes that the above discussion amply demonstrates that this Court may properly exercise its certiorari jurisdiction over the important Eighth Amendment claim raised in the certiorari petition, Petitioner requests that, if this Court has any doubt about its jurisdiction, the Court treat the petition as an original application for writ of habeas corpus filed in this Court. See 28 U.S.C. § 2241(d) ("writs of habeas corpus may be granted by the Supreme Court [or] any justice thereof ....."). Under the special circumstances presented in this case, such an exercise of that original habeas corpus jurisdiction would be appropriate.

Petitioner has satisfied all of the requirements for filing an original habeas corpus application in this Court. In particular, he has fully exhausted his remedies in the Texas

courts. See Mooney v. Holohan, 294 U.S. 103, 115 (1935); see generally Robert L. Stern et al., SUPREME COURT PRACTICE, § 11.3, at 508-09 (6th ed. 1986). Furthermore, as explained in the certiorari petition previously lodged with this Court, it is unnecessary to require Petitioner to file a successive federal habeas corpus petition raising his Eighth Amendment claim. See *Cert. Pet.*, at 25-27. Because the operative facts in this case are undisputed -- in particular, the inordinate delay on the part if the State of Texas -- there is no need for additional factual development. Thus, this Court may appropriately hear the case in its present procedural posture.[12]

[12] If this Court believes that further factual development is necessary, Petitioner requests that this Court stay his imminent execution and transfer this case -- if treated as an original application for writ of habeas corpus -- to the U.S. District Court for the Northern District of Texas. See 28 U.S.C. § 2241(b). As explained in the certiorari petition, the federal abuse of the writ doctrine would not bar such a successive federal habeas petition since Petitioner is asserting that he is constitutionally *ineligible* to be executed.

CONCLUSION

In order to address the many important Eighth Amendment issues raised by this petition, this Court should grant certiorari and stay Petitioner's imminent execution.

Respectfully submitted,

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APPENDIX A

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BY

No. 18,075-B

EX PARTE:	§	**IN THE 137TH DISTRICT COURT**
	§	**OF**
CLARENCE ALLEN LACKEY	§	**LUBBOCK COUNTY, TEXAS**

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON APPLICATION FOR POST-CONVICTION WRIT OF HABEAS CORPUS

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Applicant, Clarence Allen Lackey, was convicted for the second time in this case by a jury of the offense of Capital Murder on April 15, 1983, and pursuant to the affirmative findings of the jury to the special issues, punishment was assessed by this Court at death.

Direct Appeal

Applicant then directly appealed to the Court of Criminal Appeals of Texas, which affirmed the conviction and sentence on June 14, 1989. *Lackey v. State,* 816 S.W.2d 392 (Tex.Crim.App. 1989). Following the Supreme Court's decision in *Penry v. Lynaugh,* 492 U.S. 302 (1989), the Court of Criminal Appeals granted rehearing. After supplemental briefing and argument, the Court affirmed Applicant's sentence on May 29, 1991. *Lackey v. State,* 819 S.W.2d 111 (Tex.Crim.App. 1991). Applicant's second motion for rehearing was denied on September 25, 1991. Because Applicant did not seek certiorari review, his conviction became final on December 24, 1991, upon expiration of

the time for filing a petition for writ of certiorari.

First State Habeas Action

No action was taken in the case by Applicant until four months later when this Court, on April 17, 1992, conducted a hearing prior to setting an execution date. On April 28, 1992, an order scheduling Applicant's execution for July 17, 1992, was entered. On July 9, 1992, the Court permitted Applicant to substitute counsel, and on July 13, 1992, substitute counsel requested that the execution date be modified so that an investigation could be conducted and claims presented in a state habeas application. That motion was granted the same day and the execution date rescheduled for October 17, 1992. On September 17, 1992, Applicant again requested that the execution date be modified, and the request was again granted. Applicant's execution was subsequently set for December 17, 1992. On December 3, 1992, this Court held a hearing on four motions filed by Applicant: a motion for discovery, which was denied; a motion for funds for experts, which was denied; a motion, to transcribe Applicant's second competency hearing, which was granted; and a motion to modify the execution date, which was denied. On December 11, 1992, less than six days prior to the scheduled execution, Applicant finally filed a state habeas application. At 9:00 a.m. on December 16, 1992, this Court entered findings of fact and conclusions of law and recommended that relief be denied. The Court of Criminal Appeals adopted the findings and denied relief at approximately 2:30 p.m. on December 16, 1992. *Ex parte Lackey,* No. 24,267-01 (Tex.Crim.App. Dec. 16, 1992).

First Federal Habeas Action

Applicant then filed a federal habeas petition and request for a stay of execution in the United States District Court for the Western District of Texas, Midland-Odessa Division. The district court granted the stay at 4:27 p.m. on December 16, 1992. The Director responded on January 12, 1993. After conducting an evidentiary hearing and receiving post-hearing briefing, the district court denied federal habeas relief, but granted a certificate of probable cause to appeal.

Applicant appealed the federal district court's denial of habeas relief to the Fifth Circuit Court of Appeals. The Fifth Circuit initially set the case for oral argument, but after receiving supplemental briefing from both parties, issued its opinion affirming the district court's denial of habeas relief without argument. *Lackey v. Scott*, 28 F.3d 486 (5th Cir. 1994). Applicant then filed a petitioned for writ of certiorari in the United States Supreme Court, which was denied on January 9, 1995. *Lackey v. Scott*, 115 S.Ct. 743 (1995). On February 2, 1995, this Court scheduled Applicant's execution for March 6, 1995. Applicant filed the instant application for writ of habeas corpus on February 23, 1995.

QUESTION RAISED IN PETITION

Applicant has raised a single issue in his application regarding the constitutionality of his pending sentence of death due to the duration of time he has spent on death row.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Initially it is important to note that while Applicant has been on death row for a period of approximately twelve years since the date of his second trial, an execution date was not set until April 28, 1992. Consequently, the amount of time that Applicant has actually spent with a pending execution date is less than three years.

Applicant has alleged that the State of Texas has forfeited its right to execute him, pursuant to the eighth and fourteenth amendments of the United States Constitution and to Article 1, section 13 of the Texas Constitution, because of torture to which the State has allegedly subjected him. Specifically, Applicant contends that the forfeiture of the State's right to execute him has resulted, "both from the inordinate amount of time that [Applicant] has spent on Texas' death row and the State's unnecessary setting of repeated execution dates in this case." (Application at 8). According to Applicant his stay on death row has been "filled with severe stress, depression and anxiety.... I became very ill -- emotionally and physically..." and that there have been, "countless times that I have been unable to eat or sleep because of the never-ending stress that I have felt." (Affidavit of Clarence Lackey).

Nevertheless, the reality of the situation is remarkably incongruent with these claims. The record shows that out of four execution dates that have been scheduled, two directly resulted from requests from *Applicant's attorneys* who alleged that they needed more time to prepare a writ application. These two requests were granted by this Court and extended the execution date from July 17, 1992, until December 17, 1992. On

December 16, 1992, *Applicant's attorneys* initiated an unsuccessful federal writ application and appeal to the Fifth Circuit Court of Appeals. *Applicant's attorneys* then took the issues raised by that habeas application to the United States Supreme Court where they were not resolved until January 9, 1995. Consequently, since the setting of the initial execution date of July 17, 1992, any delay in the implementation of the sentence was directly attributable to Applicant's numerous requests for stays and modifications of the execution dates. In essence, various entities acting on Applicant's behalf have managed to delay his execution for almost 2½ years. At the same time, these same entities are responsible for the setting of two of the four execution dates and the filing of numerous documents attacking Applicant's death sentence.

What has been glaringly absent however, is any single mention of the physical and psychological "torture" that Applicant's attorneys now claim has incapacitated him to such a degree that the State should forfeit its right to carry out the jury's judicially approved sentence. Notably, this application represents the second time that Applicant has attacked his confinement on death row in Texas courts under this cause number and the third time overall that he has alleged error in his conviction or sentence since the setting of the initial execution date. Nevertheless, he has not argued that the assertion he brings in this successive application could not have been raised in his first state application or within his first federal application - even though Applicant's instant application is explicit and persistent in maintaining that his claims of emotional and physical duress have allegedly existed for several years.

The Court of Criminal Appeals has recognized the doctrine of "abuse of writ" and held that an applicant may waive and abandon his allegations by the repetitious filing of applications. In *Ex parte Carr*, 511 S.W.2d 523 (Tex.Crim.App. 1974), the Court stated that:

> "A proper respect for the concept of justice it is the office of the Great Writ to protect, requires that petitions be filed in earnest and that all contentions of merit be presented and ruled upon as expeditiously as possible. The writ of habeas corpus is too serious and important a matter to be lightly used, and easily abused. It is a shield against injustice which should not be suffered to become a weapon in the hands of spiteful persons."
>
> Id. at 525.

In the instant case, Applicant persists in raising repetitious applications that continue to lack merit without explaining why he could not have brought his complaints in his initial writ applications. His abuse of the state writ process may procedurally bar him and foreclose the issue.

Regardless, Applicant is advancing a novel argument in that the State cannot execute him because to do so would subject him to unconstitutionally cruel and unusual punishment resulting from the number of years he has spent on death row. In support of this argument Applicant offers primarily a Jamaican appellate case in which the sentences of two men were commuted from death to life after a delay of sixteen years in carrying out their executions. *Earl Pratt and Ivan Morgan v. The Attorney General for Jamaica and the Superintendent of Prisons, Saint Catherine's, Jamaica*, Privy Council Appeal No.10 of 1993 (Judgement of the Lords of the Judicial Committee of the Privy Council, 11/2/93). However, it cannot be argued that the courts of this country are bound or

guided by a decision from the cited foreign jurisdiction, or any other foreign jurisdiction. Further, the rationale of the Jamaican case is that the death penalty was not carried out expeditiously after sentence, within a matter of weeks or months in the event of appeal; that rules and practices were set forth in a strict timetable for appeals to the Judicial Committee of the Privy Council that was in force in Jamaica before independence and adopted after independence by the Governor-General in Privy Council in 1962; that such rules and practices were not followed in the *Pratt and Morgan* case; that the applicable law which was included in the Constitution against the background of preexisting common law held that execution follow as quickly as practical after sentence; and, that the delay in *Pratt and Morgan* case would never have been so extensive if the Governor-General and the Judicial Privy Council had reviewed the case pursuant to sections 90 and 91 of the Constitution in 1981 after the Court of Appeal dismissed application for leave to appeal. The Jamaican case, which extensively discusses the legal vehicles and practices in Jamaica and the United Kingdom, is inapplicable to the instant case and to any other death penalty case in the State of Texas. If applicable, all death row inmates who were not executed after a specific period of time, i.e., three years, could argue that their sentences should be commuted to life imprisonment. Applicant has not propounded any persuasive holdings from the courts of this State or the United States which would establish that the amount of time spent on death row should be the measure of the constitutionality of a particular death sentence under the eight and fourteenth amendments. Neither does Applicant offer Texas or federal authority which controls the question of

whether his sentence constitutes one of "those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted." See, *Stanford v. Kentucky*, 492 US 361, 368, 106 L Ed 2d 306, 109 S Ct 2969 (1989) *reh. den.* 492 US 937, 106 L Ed 2d 635, 110 S Ct 23 (1989); *Ford v Wainwright*, 477 US 399, 405, 91 L Ed 2d 335, 106 S Ct 2595 (1986).

This leaves Applicant to argue that the effect of years spent on death row is contrary to the "evolving standards of decency that mark the progress of a maturing society." *Stanford v. Kentucky*, 492 US at 369, *quoting Trop v Dulles*, 356 US 86, 101, 2 L Ed 2d 630, 78 S Ct 590 (1958). In determining what standards have "evolved," courts should look not to their own conceptions of decency, but to those of modern American society as a whole. In presenting authority primarily from the English Commonwealth, Applicant ignores the clear teachings of the U.S. Supreme Court in *Stanford*, as Justice Scalia explained:

> "We emphasize that it is American conceptions of decency that are dispositive, rejecting the contention of petitioners and their various amici... that the sentencing practices of other countries are relevant. While '[t]he practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely an historical accident, but rather so 'implicit in the concept of ordered liberty' that it occupies a place not merely in our mores, but, text permitting, in our Constitution as well.' *Thompson v Oklahoma*, 487 US 815, 868-869, n 4, 101 L Ed 2d 702, 108 S Ct 2687 (1988) (Scalia, J., dissenting), *quoting Palko v Connecticut*, 302 US 319, 325, 82 L Ed 288, 58 S Ct 149 (1937) (Cardozo, J.), they cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among our people."
>
> *Stanford v. Kentucky*, 492 US at 369, fn 1.

This Court is not persuaded by Applicant's American "authority" that his time spent on

death row denies the State the right to execute him. The proffered cases merely describe the existence of inmates confined in places outside of the Texas prison system and do not decide the question of whether such conditions rise to the level of unconstitutionally cruel and unusual punishment.

Finally, the Supreme Court, in the case which Applicant claims is analogous to the instant case, stated:

> "Petitioner's suggestion is that because he once underwent the psychological strain of preparation for electrocution, now to require him to undergo this preparation again subjects him to a lingering or cruel and unusual punishment. **Even the fact that Petitioner has already been subjected to a current of electricity does not make his subsequent execution any more cruel in the constitutional sense than any other execution. The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely**... we cannot agree that the hardship imposed upon the petitioner rises to that level of hardship denounced as denial of due process because of cruelty. (emphasis added) .
>
> *State of Louisiana ex rel. Francis v. Resweber, Sheriff, et al.*, 329 U.S. 459; 67 S.Ct. 374, 376 (1947).

Undeniably, Applicant's coming "within hours" of his third legally scheduled execution date cannot rise to the level of a denial of due process because of cruelty. Further, as the Supreme Court stated in *Whitley*, *supra*, "[n]ot every governmental action affecting the interests or well-being of a prisoner is subject to Eighth Amendment scrutiny, however. *Whitley*, 475 U.S. at 318, 106 S.Ct. at 1084. An eighth amendment claimant must allege and prove the unnecessary and wanton infliction of pain, and this general requirement should be applied with due regard for the differences in the kind of

conduct of which the claimant is complaining. Id. For example, extreme deprivation is required for a valid conditions-of-confinement claim. *Hudson*, 112 S.Ct. at 1000. Deliberate indifference to a prisoner's medical needs rises to an eighth amendment violation only if the prisoner's medical needs are serious. Id. Excessive force, used maliciously and sadistically to cause harm, always violates the eighth amendment, but not "every malevolent touch by a prison guard gives rise to a federal cause of action." Id. Moreover, to the extent that conditions of confinement "are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offense against society." *Rhodes*, 452 U.S. at 347, 101 S.Ct. at 2399.

In the instant case, Applicant, while complaining of the slow pace of the implementation of his death sentence because of appellate and habeas review, is also complaining that such review is going forward to the extent that there is a pending execution date; and, that he is psychologically unable to cope with the stress of the events. Applicant's claim is not cognizable in a petition to determine the legality of his sentence or confinement and does not rise to the level of denial of due process pursuant to the eighth amendment of the United States Constitution or Article 1, section 13 of the Texas Constitution.[1] Based on the foregoing, Applicant's claim is without merit and should be denied. He raises questions of law and fact which can be resolved by the Court

---

[1] As the Seventh Circuit Court of Appeals noted, when reviewing John Wayne Gacy's final petition for writ of habeas corpus, "[t]he district court concluded that Gacy's difficulty in coping with the events does not differ from what many other persons experience when all legal and factual avenues have been exhausted and the end of mortal existence looms." *Gacy v. Page*, 24 F.3d 887 (7th Cir. 1994).

of Criminal Appeals upon review of official court records and without need for an evidentiary hearing.

In conclusion, Applicant has completely failed to allege facts which would entitle him to habeas corpus relief. Nor does the application in question show that there are previously unresolved issues affecting Applicant's sentence. This Post-Conviction Writ of Habeas Corpus should be denied. In consideration of the additional requests attached to Applicant's application, the Court is of the opinion that:

(1) Applicant's request for a stay of his execution is denied.

(2) His request for the issuance of a writ of habeas corpus is denied.

(3) His request for an evidentiary hearing is denied.

(4) The record reveals that this Court has already granted Applicant the right to proceed in *forma pauperis* in regards to his payment of costs and fees.

(5) Applicant has failed to demonstrate that he is entitled to relief under V.A.C.C.P. Art. 11.07. Consequently, his application is in all things denied.

ORDER

1. The Clerk of this Court shall promptly submit to the Clerk of the Court of Criminal Appeals a transcript containing the following:

   A. A copy of the Applicant's Petition for Writ of Habeas Corpus and attached exhibits, and

   B. A copy of this Findings of Fact and Conclusions of Law.

2. A copy of these Findings of Facts and Conclusions of Law shall be promptly delivered to Mr. Brent E. Newton, Attorney for Applicant, Texas Resource Center, 3223 Smith Street, Suite 215, Houston, Texas 77006.

SIGNED AND ENTERED this 1st day of March, 1995 A.D.

Respectfully submitted,

Cecil G. Puryear,
JUDGE PRESIDING

APPENDIX B

EX PARTE CLARENCE ALLEN LACKEY

WRIT NO. 24,267-02

Habeas Corpus Application
From LUBBOCK County

O R D E R

This is a post conviction application for writ of habeas corpus filed pursuant to the provisions of Art. 11.07, V.A.C.C.P.

On April 15, 1983, a jury found applicant guilty of the offense of capital murder. Punishment was assessed at death. This Court affirmed applicant's conviction on direct appeal. Lackey v. State, 819 S.W.2d 111 (Tex.Cr.App. 1989). The trial court has scheduled applicant's execution to be carried out on or before sunrise, March 6, 1995.

In the instant cause, applicant presents a single allegation in which he challenges the constitutionality of proceeding with his execution. The trial court has entered findings of fact and conclusions of law and recommended the relief sought be denied.

This Court has reviewed the record. The findings and conclusions entered by the trial court are supported by the record and upon such basis the relief sought is denied.

IT IS SO ORDERED THIS THE 1ST DAY OF MARCH, 1995.

PER CURIAM

En banc
Do Not Publish
Clinton, J., not participating.

APPENDIX C

NO. 94-10302

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

JOHNNY LOGAN HICKS,
Petitioner-Appellant,

v.

WAYNE SCOTT, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,
Respondent-Appellee.

On Appeal From the United States District Court
For the Northern District of Texas
Fort Worth Division

RESPONDENT-APPELLEE'S RESPONSE
TO PETITIONER-APPELLANT'S PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING *EN BANC*

DAN MORALES
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JORGE VEGA
First Assistant Attorney General

DREW T. DURHAM
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ATTORNEYS FOR RESPONDENT-APPELLEE

NO. 94-10302

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

JOHNNY LOGAN HICKS,
Petitioner-Appellant,

v.

WAYNE SCOTT, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,
Respondent-Appellee.

On Appeal From the United States District Court
For the Northern District of Texas
Fort Worth Division

RESPONDENT-APPELLEE'S RESPONSE
TO PETITIONER-APPELLANT'S PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING *EN BANC*

TO THE HONORABLE JUDGES OF THE COURT OF APPEALS:

NOW COMES Wayne Scott, Director, Texas Department of Criminal Justice, Institutional Division, Respondent-Appellee, hereinafter "the Director," by and through the Attorney General of Texas, and files this his Response to Petitioner-Appellant's Petition for Rehearing and Suggestion For Rehearing *En Banc.*

I.

On October 13, 1994, a panel of this court affirmed the district court's denial of relief to Petitioner-Appellant, hereinafter "Hicks." The panel held, *inter alia,* that the Texas Court of Criminal Appeals' citation of Hicks for abuse of the writ constituted a procedural default that barred federal habeas review of his *Batson*[1] claim.

Hicks now seeks both panel rehearing and rehearing *en banc* on three grounds: (1) that Texas' abuse-of-the-writ doctrine is not an adequate and independent state law ground, (2) that Hicks adequately preserved his *Batson* claim at trial, and (3) that Hicks was not required to make a trial objection to preserve *Batson* error. The Director is constrained to confess error as to the first ground; the judgment of the district court nonetheless should be affirmed, however, because Hicks' other grounds for rehearing are meritless.

II.

Hicks first argues that the panel erred in finding that the Texas Court of Criminal Appeals regularly and strictly applies its abuse-of-the-writ doctrine After having reviewed the authorities cited by Hicks and conducting additional research, the undersigned has concluded that Hicks' position is legally correct. Thus, the Director confesses error as to this point of law and concedes that being cited for abuse of the writ by the Texas Court of Criminal Appeals does not bar a federal habeas petitioner from review of the merits of his claims.

III.

Hicks next argues that he adequately preserved his *Batson* claim at trial. He is incorrect. Hicks candidly concedes that his "argument at trial was not a *Batson* objection *per se* . . . ." Petition at 5. Instead, "trial counsel's arguments primarily

[1] *Batson v. Kentucky,* 476 U.S. 79, 106 S. Ct. 1712 (1986).

concerned an objection to the State's use of the jury shuffle as a means to keep African-Americans off of [Hicks'] petit jury . . . . " *Id.* Thus, Hicks did not preserve *Batson* error under the law of this Circuit, which requires "'a timely objection . . . to the prosecutor's use of his peremptory challenges.'" *Wilkerson v. Collins*, 950 F.2d 1054, 1063 (5th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 3035 (1992), quoting *Thomas v. Moore*, 866 F.2d 803, 804 (5th Cir.), *cert. denied*, 493 U.S. 840, 110 S. Ct. 124 (1989).

Hicks, relying on *Trevino v. Texas*, ___ U.S. ___, 112 S. Ct. 1247 (1992), also argues that inasmuch as his trial was held before *Batson* was decided, a more liberal standard should apply to whether he preserved error. *Trevino* provides Hicks no succor, however, because in that case the defendant specifically objected to the state's use of peremptory challenges to exclude minority venire members. 112 S. Ct. at 1548. Here, Hicks took no such action, and he therefore is not entitled to merits review of this claim as a matter of federal constitutional law.

IV.

Finally, Hicks argues that under *Ford v. Georgia*, 498 U.S. 411, 111 S. Ct. 850 (1991), a contemporaneous trial objection is not required as a substantive component of a *Batson* claim. Again, Hicks is mistaken. In *Ford*, the Court held that the Georgia courts could not impose a state procedural bar that did not exist at the time of his trial. The question whether Ford had complied with the requirements of *Batson* itself was not presented in that case, because "[t]he State, indeed, concedes that petitioner properly raised a *Swain*[2] claim in his pretrial motion . . . . ," 111 S. Ct. at 855, and "a defendant alleging a violation of equal protection of the law under *Swain* necessarily states an equal protection violation

[2] *Swain v. Alabama*, 380 U.S. 202, 85 S. Ct. 824 (1965).

subject to proof under the *Batson* standard of circumstantial evidence as well." *Id.* at 856.

Thus, contrary to Hicks' assertion, *Ford* did not overrule the law of this Circuit that *Batson* itself requires a trial objection. That this is so is further evident from the Court's denial of *certiorari* in *Wilkerson* after *Ford* had been decided. Hicks' failure to preserve *Batson* error at trial bars federal habeas review of that claim.

Respectfully submitted,

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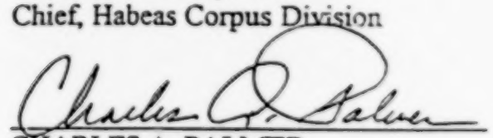
Attorney General of Texas

JORGE VEGA
First Assistant Attorney General

DREW T. DURHAM
Deputy Attorney General for
Criminal Justice

WILLIAM C. ZAPALAC
Assistant Attorney General
Chief, Habeas Corpus Division



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ATTORNEYS FOR
RESPONDENT-APPELLEE

CERTIFICATE OF SERVICE

I, Charles A. Palmer, Assistant Attorney General of Texas, do hereby certify that a true and correct copy of the above and foregoing Respondent-Appellee's Response to Petitioner-Appellant's Petition for Rehearing and Suggestion for Rehearing *En Banc* has been served by placing same in the United States Mail, postage prepaid, on this the 17th day of November, 1994, addressed to: Steve Losch, Attorney At Law, 5454 Newcastle Drive, Apt. 1823, Houston, Texas 77081, David Cunningham, 2740 Texas Commerce Tower, 600 Travis Street, Houston, Texas 77002, and Robert C. Owen, Texas Resource Center, 1206 San Antonio Street, Austin, Texas 78701.

CHARLES A. PALMER
Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

JERRY LEE HOGUE, Petitioner	§	
V.	§	CIVIL ACTION NO. 4:92-CV-359-A
WAYNE SCOTT, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, Respondent	§	

RESPONDENT'S RESPONSE TO PETITIONER'S MOTION TO ALTER OR AMEND JUDGMENT PURSUANT TO FED.R.CIV.P. 59(e) AND BRIEF IN SUPPORT.

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Wayne Scott, Director, Texas Department of Criminal Justice, Institutional Division, Respondent herein, by and through his attorney, the Attorney General of Texas, and files this his Response to Petitioner's Motion to Alter or Amend the Judgment Pursuant to FED.R.CIV.P. 59(e). In Support thereof, Respondent would respectfully show the Court as follows:

On November 17, 1994 the Court entered its final judgment and denied the petition for writ of habeas corpus filed by Petitioner, hereinafter "Hogue." On November 28, 1994 Petitioner filed a Motion to Alter and Amend Judgment Pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. Hogue requests this Court to amend its Memorandum Opinion and Order to reflect Respondent's recent concession in *Hicks v.* Scott, No. 94-10302 (5th Cir. 1994), that the invocation of "abuse of the writ" against Mr. Hogue by the Texas Court of Criminal Appeals cannot bar federal review of the merits of his claims.

In light of the Director's recent concession that citation for abuse of the writ by the Texas Court of Criminal Appeals does not bar a federal habeas petitioner

from review of the merits of his claims, the Director agrees that it is appropriate to amend this Court's November 17, 1994 Memorandum Opinion and Order to omit reliance on the Court of Criminal Appeals' finding of abuse of the writ as a procedural bar foreclosing Hogue from having his petition reviewed on its merits.

The Director contends, however, that this Court's alternative holding on the merits of the issues demonstrates Hogue is not entitled to habeas corpus relief. Additionally, the Director submits that the Supreme Court's recent decision in *Romano v. Oklahoma*, 114 S.Ct 2004, 2011-13 (1994) further supports the Court's holding in Section VI (D).

WHEREFORE, PREMISES CONSIDERED, Respondent respectfully consents to Hogue's' motion to amend this Court's November 17, 1994 Memorandum Opinion and Order.

Respectfully submitted,

DAN MORALES
Attorney General of Texas

JORGE VEGA
First Assistant Attorney General

DREW T. DURHAM
Deputy Attorney General
for Criminal Justice

MARGARET PORTMAN GRIFFEY
Assistant Attorney General
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ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I, Reneau J. Longoria, Assistant Attorney General of Texas, do hereby certify that a true and correct copy of the above and foregoing Respondent's Response to Petitioner's Motion to Alter or Amend the Judgment Pursuant to FED.R.CIV.P. 59(e) and Brief in Support has been served by hand-delivery on this the 5th day of December, 1994, to: Robert Owen, Texas Resource Center, 1206 San Antonio Street, Austin, Texas 78701.

RENEAU J. LONGORIA
Assistant Attorney General

APPENDIX D

POST CONVICTION REMEDIES

PURSUANT TO ARTICLE 11.07, V.A.C.C.P.

© 1990

John G. Jasuta

Chief Staff Attorney

Court of Criminal Appeals

512/463-1600

updated November 8, 1990

the writ is assigned will make an initial review and presentation of the application to the Court in banc. As stated above, the Court will either vote to deny the writ, remand for further fact findings, or file and set the writ. If denial is the course chosen a postcard, known in inmate circles as the "white card", will be sent to the applicant informing him or her that the application has been denied. Since the writ was never docketed there is no rehearing entertained from such an action. Tex.R.App.Pro., Rule 213(b). If further facts are necessary for disposition a remand order will be entered requiring the trial court to conduct a hearing or to gather information through other avenues available through the statute. See e.g. Ex parte Campos, 613 S.W.2d 745 (Tex.Cr.App. 1981); Ex parte Smith, 650 S.W.2d 68 (Tex.Cr.App. 1983). If the case is ordered filed and set for submission to the Court the cause is assigned an entirely new number which is part of the Court's regular appeal numbering system. However, if any new writ applications are filed by that individual, regardless of the outcome of the application which was ordered filed and set, it will be filed for initial review under the permanent writ number assigned to that individual.

PROCEDURES IN ABUSE CASES WITHIN THE COURT

The Court of Criminal Appeals recognized the doctrine of "abuse of the writ" in Ex parte Carr, 511 S.W.2d 523 (Tex.Cr.App. 1974). In that case the Court held that the applicant had waived and abandoned his allegations by his repetitious filing of applications for relief. The Court took the opportunity to explain the procedure to be followed in Ex parte Dora, 548 S.W.2d 392 (Tex.Cr.App. 1977). Review is not precluded, however, by the abuse order but the applicant must make a showing that the issue or issues have not been raised previously and could not have been, along with a showing of "good cause".

There is no general rule governing how many applications constitute an abuse of the writ process. Such a rule would be difficult if not impossible to draw since many applicants raise everything in their first application while others become repetitious at a much slower rate. In Ex parte Emmons, 660 S.W.2d 106 (Tex.Cr.App. 1983), the Court found the applicant to have committed perjury both in the application and at an evidentiary hearing. An abuse order was entered following this first application.

As stated, review and relief is not precluded by such an order. Ex parte Bilton, 602 S.W.2d 534 (Tex.Cr.App.1980), is an example where the applicant, after being cited for abusing the writ process, was granted relief due to a fundamentally defective indictment which holding was based on cases decided after applicant had been cited for his abuse. A change in the law entitled the applicant to relief in Ex parte Stuart, 653 S.W.2d 13 (Tex.Cr.App. 1983), after he had been cited for abuse.

COUNTY OF TRAVIS
STATE OF TEXAS

AFFIDAVIT OF TROY BENNETT

1. My name is Troy Bennett. I am Chief Clerk to the Court of Criminal Appeals for the State of Texas.

2. Each Wednesday when the Court of Criminal Appeals is in regular session, the Court makes public a list of its orders issued and opinions handed down.

3. One category listed in this weekly report is "APPLICATIONS FOR WRIT OF HABEAS CORPUS DENIED WITHOUT WRITTEN ORDER." Under this listing are the names of individuals whose writs of *habeas corpus* were so denied, preceded by a two-part number and followed by the county name in which the application was filed.

4. The two-part number preceding the individual's name indicates the four or five digit writ number assigned to the application by the Clerk's office, followed by a dash and a two digit number representing the total number of writs for *habeas corpus*, including that particular writ, filed by the individual challenging a particular conviction or sentence.

5. For example, in the weekly orders list issued on February 15, 1995, L.V. Morris' third writ of *habeas corpus* petition was denied without written order (6,510-03), as was Sherman Wilkins' thirteenth petition (8,217-13), Glen Dale Mulder's seventh petition (9,840-07), and Pete Benevides' twelfth petition (11,639-12). A true and correct copy of the orders list for that date is appended to this affidavit as Exhibit A and incorporated here by reference.

6. This procedure for identifying the number of applications for post-conviction writs of *habeas corpus* each individual has filed was developed informally by the Court and has been used for approximately 10-11 years.

I affirm that the foregoing is true and correct, and I so state under pain and penalty of perjury.

Troy Bennett

The foregoing instrument was signed and sworn before me on this 21st day of February, 1995.

John F. Brown
NOTARY PUBLIC

My commission expires: 11-25-1995

JOHN F. BROWN
Notary Public, State of Texas
My Commission Expires
Nov. 25, 1995

C T OF CRIMINAL APPEALS

FEBRUARY 15, 1995

THE FOLLOWING ORDERS ARE ENTERED AND OPINIONS HANDED DOWN:

HABEAS CORPUS RELIEF GRANTED - OPINIONS BY THE COURT:

71,994 EX PARTE JAMES HAROLD BROWN - HABEAS CORPUS APPLICATION FROM FAYETTE COUNTY
(JUDGE BAIRD CONCURS IN RESULT WITH NOTE)
(JUDGE KELLER DISSENTS)

72,022 EX PARTE DANIEL BLANCARTE PEREZ - HABEAS CORPUS APPLICATION FROM BEXAR COUNTY

72,023 EX PARTE STACY LYNN CONNER - HABEAS CORPUS APPLICATION FROM LUBBOCK COUNTY
(PRESIDING JUDGE MC CORMICK & JUDGE WHITE DISSENT)

72,024 EX PARTE BRYAN LUMAR PARKER - HABEAS CORPUS APPLICATION FROM DENTON COUNTY

STATE'S MOTION FOR REHEARING DENIED:

1,399 DAVID LEE POWELL FROM TRAVIS COUNTY
(JUDGE MANSFIELD WOULD GRANT ON NO. 1)

ON APPELLANTS' PETITIONS FOR DISCRETIONARY REVIEW:

793-91 ROY LEE HUBBARD FROM TARRANT COUNTY 02-89-00303-CR
JUDGMENT OF THE COURT OF APPEALS REVERSED:
CAUSE REMANDED TO THAT COURT - OPINION PRESIDING JUDGE MC CORMICK
(CONCURRING OPINION JUDGE BAIRD)
(CONCURRING IN PART & DISSENTING IN PART - OPINION JUDGE MALONEY JOINED BY JUDGE CLINTON)
(JUDGE OVERSTREET DISSENTS)
(JUDGE MEYERS NOT PARTICIPATING)

090-94 ROBERT LYNN WASHINGTON FROM HALE COUNTY 07-93-00113-CR
PETITION DISMISSED AS IMPROVIDENTLY GRANTED - OPINION BY THE COURT

179-94 EDGAR PAUL BROGDAN FROM HARRIS COUNTY 14-92-01038-CR
JUDGMENT OF THE COURT APPEALS REVERSED:
CAUSE REMANDED TO THAT COURT - OPINION JUDGE MALONEY
(PRESIDING JUDGE MC CORMICK & JUDGES WHITE & MEYERS DISSENT)
(JUDGE MANSFIELD CONCURS IN THE RESULT)

256-94 RONALD BROOKS FROM SMITH COUNTY 11-92-00219-CR
JUDGMENT OF THE COURT OF APPEALS REVERSED:
CAUSE REMANDED TO THAT COURT - OPINION BY THE COURT

389-94 CHARLES ALBRIGHT FROM DALLAS COUNTY 05-92-00006-CR
PETITION GRANTED ON NOS. 7 & 13 ONLY: JUDGMENT OF COURT OF APPEALS VACATED: CAUSE REMANDED TO THAT COURT - OPINION BY THE COURT
(JUDGE KELLER NOT PARTICIPATING)

APPELLANTS' PETITIONS FOR DISCRETIONARY REVIEW REFUSED:

0547-94	DELGADO, JESUS SOTO	DALLAS COUNTY	05-92-01761-CR
0548-94	DELGADO, JESUS SOTO	DALLAS COUNTY	05-92-01762-CR
0749-94	BOATWRIGHT, RICHARD	HARRIS COUNTY	01-93-01161-CR
1115-94	RANGEL, SANTOS	HARRIS COUNTY	01-92-01128-CR
1124-94	JENKINS, CALVIN HARLEY (JUDGE BAIRD WOULD GRANT)	WILLIAMSON COUNTY	03-92-00421-CR
1297-94	RENO, GREGORY WELLS (PDR#1)	TARRANT COUNTY	02-93-00208-CR
1322-94	HILL, ANITA MAE	RANDALL COUNTY	07-93-00156-CR
1339-94	LOPEZ, DAVID M.	TARRANT COUNTY	02-93-00123-CR
1398-94	DOYLE, BILLY	WARD COUNTY	08-93-00439-CR
1404-94	HOWARD, BERNARD DEVAUGH	MC LENNAN COUNTY	10-93-00258-CR
1411-94	MOFFETT, GARY WAYNE	DALLAS COUNTY	05-93-00650-CR
1412-94	MOFFETT, GARY WAYNE	DALLAS COUNTY	05-93-00651-CR
1413-94	GIVENS, JR., BAPTIST	DALLAS COUNTY	05-92-02005-CR
1414-94	DEES, JR., EDWARD AKA FACT ACTION BONDING	DALLAS COUNTY	05-93-01889-CV
1418-94	ADVINCULA, RAFAEL G.	DALLAS COUNTY	05-93-00276-CR
1419-94	GORDON, HARVEY DURELL	HARRIS COUNTY	01-93-00194-CR
1421-94	TK'S VIDEO, INC.	DENTON COUNTY	02-93-00099-CR
1424-94	JEANSONNE, CHRISTOPHER JAKE	HARRIS COUNTY	01-94-00027-CR
1425-94	JEANSONNE, CHRISTOPHER JAKE	HARRIS COUNTY	01-94-00028-CR
1427-94	JOHNSON, GEORGE KENNETH	HARRIS COUNTY	01-93-01159-CR
0014-95	JACKSON, PATRICK WAYNE	HARRIS COUNTY	14-93-00427-CR
0018-95	GUILLEN, TRINIDAD	TARRANT COUNTY	02-93-00197-CR
0045-95	PARRISH, BRENDA FAY (JUDGE BAIRD WOULD GRANT)	HARRIS COUNTY	14-90-00989-CR
0061-95	OWINGS, BRUCE ANTHONY	BRAZORIA COUNTY	14-93-00282-CR
0065-95	DIXON, DENISE BETTLOU AKA DIXON, DENISE BETTELOU	MONTGOMERY COUNTY	09-93-00164-CR
0066-95	TYLER, ROSALIND E.	JEFFERSON COUNTY	09-94-00002-CR
0086-95	TAPLIN, STANLEY GENE AKA TAPLIN, STANLEY	TARRANT COUNTY	02-93-00397-CR
0095-95	MORRISON, TOMMIE	HARRIS COUNTY	01-93-00429-CR
0098-95	SMITH, DANNY	WOOD COUNTY	12-94-00186-CR
0100-95	BROWN, OTIS CHARLES	DALLAS COUNTY	07-93-00270-CR
0101-95	BROWN, OTIS CHARLES	DALLAS COUNTY	07-93-00271-CR
0102-95	BROWN, OTIS CHARLES	DALLAS COUNTY	07-93-00272-CR
0103-95	BROWN, OTIS CHARLES	DALLAS COUNTY	07-93-00273-CR

STATE'S PETITION FOR DISCRETIONARY REVIEW REFUSED:

1297-94	RENO, GREGORY WELLS (PDR#2)	TARRANT COUNTY	02-93-00208-CR
1367-94	WARNER, WILLIE EDWARD	BELL COUNTY	03-92-00422-CR
1428-94	JOHNSON, CONTEE DUMONT	HARRIS COUNTY	14-92-01036-CR

(PRESIDING JUDGE MC CORMICK WOULD GRANT ON NO. 1)
(JUDGE MANSFIELD WOULD GRANT ON NO. 2)

APPELLANTS' MOTIONS FOR REHEARING ON PETITION FOR DISCRETIONARY REVIEW DENIED:

0929-94	DAMIAN, JAMES EDWARD	BRAZORIA COUNTY	01-91-01444-CR
1116-94	SHOULDERS, CURTIS	HARRIS COUNTY	01-93-00243-CR
1117-94	WALL, DONNIE KEITH	JACKSON COUNTY	13-92-00493-CR
1206-94	LYON, RICHARD ALAN ABOOD (JUDGE KELLER NOT PARTICIPATING)	DALLAS COUNTY	08-92-00165-CR
1219-94	SURETTE, GWEN P.	HARRIS COUNTY	01-93-00432-CR
1248-94	THACKER, LESLIE HAZLETT	HARRIS COUNTY	14-92-00595-CR

STATE'S MOTION FOR REHEARING ON PETITION FOR DISCRETIONARY REVIEW DENIED:

0346-93	PAVLAKA, DAVID STANLEY	HARRIS COUNTY	01-91-01010-CR

APPLICATIONS FOR WRIT OF HABEAS CORPUS DENIED WITHOUT WRITTEN ORDER:

6,510-03	MORRIS, L. V.	DALLAS COUNTY
8,217-13	WILKINS, SHERMAN	TRAVIS COUNTY
9,840-07	MULDER, GLEN DALE	JOHNSON COUNTY
1,639-12	BENEVIDES, PETE	GALVESTON COUNTY
2,113-02	BYNUM, ROBERT LOUIS	HARRIS COUNTY
2,406-02	BLOUNT, JOE TERRELL	HARRIS COUNTY
2,866-03	MURRELL, GETZELL	JOHNSON COUNTY
3,943-03	PIERCE, DONALD RAY	SMITH COUNTY
4,222-02	BELTON, THERON	ANGELINA COUNTY
6,641-04	WALTON, JAMES ODELL	DALLAS COUNTY
7,423-02	DOZIER, GENE EDWARD	NAVARRO COUNTY
7,818-04	WIGLEY, TROY EUGENE	TRAVIS COUNTY
7,910-03	KNOTTS, JOSEPH ALEXANDER	HARRIS COUNTY
8,113-02	MC DONALD, BERT	SMITH COUNTY
9,652-02	ROWLAND, JAMES EDWARD	DALLAS COUNTY
0,157-03	JACKSON, PATRICK MAC	HARRIS COUNTY
1,382-02	MOORE, HARRY P.	LAVACA COUNTY
1,472-03	SMITH, LARRY LEE	VICTORIA COUNTY
1,760-02	LEOS, ZENON C.	NUECES COUNTY
1,911-02	BUJANDA, RUBEN BAYAN	MIDLAND COUNTY
3,357-03	DOWDEN, MICHAEL LERON	DALLAS COUNTY
3,843-02	HAWKINS, LEON, JR.	HARRIS COUNTY
3,926-07	NEESE, JAY TODD	ORANGE COUNTY
4,556-01	BROOME, STEVE (JUDGE MALONEY WOULD FILE & SET)	MC LENNAN COUNTY
4,556-02	BROOME, STEVE (JUDGE MALONEY WOULD FILE & SET)	MC LENNAN COUNTY
5,357-01	ZIENTEK, RONALD L.	HARRIS COUNTY
5,482-02	ROWAN, THOMAS RANDALL	HOOD COUNTY
6,142-02	LYNCH, JIMMIE LEE	TARRANT COUNTY
6,642-02	STEELMAN, DAVID	WILLIAMSON COUNTY
6,643-03	STEELMAN, DAVID	WILLIAMSON COUNTY
6,730-02	JOHNSON, DAVID LYNN	RANDALL COUNTY
6,750-02	BLACK, FREDDIE ELLISON, JR.	WICHITA COUNTY
6,869-02	RATLEY, JERRY CECIL	JEFFERSON COUNTY
6,885-02	CITIZEN, SAMUEL	JEFFERSON COUNTY
7,091-03	CARILLO, RUSSELL ROBERT	LAVACA COUNTY
7,106-01	LANTRIP, WILLIAM T., SR.	HARRISON COUNTY
7,142-02	MARK, FRANKIE	ANGELINA COUNTY
7,143-02	SHELTON, MICHAEL	TRAVIS COUNTY
7,160-02	MONTGOMERY, GEORGE WAYNE	EASTLAND COUNTY

27,333-03	HERNANDEZ, OMERO GREGORIO	WARD COUNTY
27,467-02	JOHNSON, WILBERT CECIL	DALLAS COUNTY
27,492-02	MC CULLEN, JAMES WOOD	ANGELINA COUNTY
27,629-01	MC NULTY, TERRY PAUL	DALLAS COUNTY
27,701-01	PEOPLES, IRA, JR.	TARRANT COUNTY
27,715-01	FOULK, KENNETH GEORGE	DALLAS COUNTY
27,772-01	KALFAS, AGAPITOS NICKOLAS	HARRIS COUNTY
27,773-01	VOLK, TROY NORMAN	HARRIS COUNTY
27,773-02	VOLK, TROY NORMAN	HARRIS COUNTY
27,775-01	GRAHAM, JAMES CLEO	TARRANT COUNTY
27,777-01	OSSA, RICHARD	HARRIS COUNTY
27,780-01	PRIEST, LARRY	GONZALES COUNTY
27,781-01	HAZEL, BRANDON EUGENE	MC LENNAN COUNTY
27,783-01	MAGOON, MICHAEL ARTHUR	BRAZORIA COUNTY
27,786-01	BUCHANAN, TONY	SMITH COUNTY
27,786-02	BUCHANAN, TONY	SMITH COUNTY
27,788-01	TROYER, JAMES	DALLAS COUNTY
27,820-01	RYAN, DANNY PAUL, SR.	TOM GREEN COUNTY
27,820-02	RYAN, DANNY PAUL, SR.	COMANCHE COUNTY
27,821-01	FOSTER, LESLIE RAY	BRAZORIA COUNTY
27,826-01	ROBERTS, DONALD RAY	WALLER COUNTY
27,827-01	SHAMSIDEEN, ASADI	DALLAS COUNTY
27,828-01	JOHNSON, EDWARD CHARLES, AKA JOE ORLANDO JONES	DALLAS COUNTY
27,848-01	GILMER, MORGAN S.	ROCKWALL COUNTY
27,849-01	RILEY, CORIEL	BEXAR COUNTY
27,850-01	KIERN, TIMOTHY	TRAVIS COUNTY
27,851-01	MC CUNE, ROBERT	ANDERSON COUNTY
27,857-01	TEJEDA, RUDY	BEXAR COUNTY
27,870-01	PARKS, WALTER CRAYLE, JR.	DENTON COUNTY
27,873-01	EATON, JAMES ELVIM	DALLAS COUNTY
27,908-01	THOMAS, JOHN	HARRIS COUNTY
27,916-01	DRAKE, ROBERT EARL	BURNET COUNTY
27,916-02	DRAKE, ROBERT EARL	BURNET COUNTY
27,916-03	DRAKE, ROBERT EARL	BURNET COUNTY
27,917-01	GORDON, BOBBY DAN	DALLAS COUNTY
27,919-01	JACKSON, EUGENE	BEXAR COUNTY
27,940-01	FUQUA, JERRY DONNELL	DALLAS COUNTY
27,954-01	BANNISTER, BRUCE KEVIN	BRAZOS COUNTY
27,946-01	WARD, WILLIAM DEWAYNE	POLK COUNTY
27,956-01	REESE, MERLIN	TRAVIS COUNTY
27,970-01	CURRIE, WILLIAM	MADISON COUNTY
27,971-01	HOLT, MICHAEL RAY	TARRANT COUNTY
27,974-01	PAGE, PERCY	CHAMBERS COUNTY
27,976-01	WILLIAMS, KEITH ELLIOTT	HARRIS COUNTY
28,003-01	RAYBORN, LESLIE TODD	WOOD COUNTY
28,004-01	REAK, RICKY IRVING	NAVARRO COUNTY
28,005-01	QUIGLEY, DAVID NEAL	DENTON COUNTY
28,006-01	WEBSTER, WAYMON, JR.	ROBERTSON COUNTY
28,030-01	JACKSON, DERWIN LATHOMAS	DALLAS COUNTY
28,037-01	BANKS, LEE CARL	BRAZORIA COUNTY
28,056-01	MINEX, BRYAN KEITH	DALLAS COUNTY

MOTION FOR LEAVE TO FILE APPLICATION FOR WRIT OF HABEAS CORPUS DENIED WITHOUT WRITTEN ORDER:

28,068-01	JAIKARAN, JACQUES & SUHAILA	HARRIS COUNTY (2-9-95)

APPLICATIONS FOR WRIT OF HABEAS CORPUS DISMISSED:

26,408-02	MC CORD, JEFFREY MICHAEL	DE WITT COUNTY
26,408-03	MC CORD, HEFFREY MICHAEL	DE WITT COUNTY
6,408-04	MC CORD, JEFFREY MICHAEL	DE WITT COUNTY
8,040-01	GASTON, DARRYL WAYNE	DALLAS COUNTY

MOTION FOR LEAVE TO FILE APPLICATION FOR WRIT OF MANDAMUS DENIED WITHOUT WRITTEN ORDER:

3,057-01	BROWN, RALPH	LAMAR COUNTY

MOTION FOR LEAVE TO FILE APPLICATIONS FOR WRIT OF PROHIBITION & MANDAMUS DENIED WITHOUT WRITTEN ORDER:

,058-01	SAVAGE, III, JOHNNY HORACE	BEXAR COUNTY

APPLICATIONS FOR WRIT OF HABEAS CORPUS REMANDED FOR EVIDENTIARY HEARING:

,778-01	PATTON, RICKY A.	ANDREWS COUNTY
,813-01	STERLING, DAVID ROSS	TITUS COUNTY
,814-01	STOVER, MICHAEL LOUIS	DALLAS COUNTY

APPLICATIONS FOR WRIT OF HABEAS CORPUS ORDERED FILED AND SET FOR SUBMISSION:

,464-02	PEREZ, DANIEL BLANCARTE	BEXAR COUNTY
,823-01	CONNER, STACY LYNN	LUBBOCK COUNTY
,736-01	MARTINEZ, JOHN VALDEZ	CALDWELL COUNTY
,741-01	MARTINEZ, DOMINGO VALDEZ	CALDWELL COUNTY
,964-01	PARKER, BRYAN LUMAR	DENTON COUNTY

No. 94-8262

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

CLARENCE LACKEY

Petitioner,

v.

STATE OF TEXAS,

Respondent.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Supplement to the Petition for Writ of Certiorari was served on counsel for Respondent by fax to: Enforcement Division, Office of the Attorney General, Price Daniel Sr. Bldg., Austin, Texas, 78711, this 1st day of March, 1995. I further certify that all parties required to be served have been served. I am a Member of the Bar of this Court.

Respectfully submitted,

Robert C. Owen by express permission RBO/. Newton

Robert C. Owen
Counsel for Petitioner